



Respondent contends claimant failed to meet his burden of proof to establish he suffered a series of accidents and the preponderance of the evidence indicates claimant's condition is not related to the two accidents. Respondent argues the Administrative Law Judge's findings should be affirmed.

#### **FINDINGS OF FACT & CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, the briefs and the oral arguments of the parties, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a custodian with respondent. His job duties were described as janitorial which included vacuuming, dusting, mopping, rug cleaning, and stripping, buffing and waxing floors. Claimant was also self-employed and had a janitorial service which performed the same type of janitorial duties for his customers.

On June 10, 1997, claimant was injured when a machine he was helping unload from a truck fell and hit him across the chest and shoulder. Claimant initially had left arm, shoulders and chest pain.

Respondent referred claimant to Chris D. Fevurly, M.D. for treatment. Dr. Fevurly treated claimant with pain, anti-inflammatory and muscle relaxant medications. The doctor also referred claimant for physical therapy and restricted his work activities. Dr. Fevurly released claimant to his regular duties in August 1997. After his release, claimant continued to perform his regular job duties for respondent as well as for his own janitorial business. The claimant was treated by Dr. Fevurly until September 19, 1997.

Claimant did not request additional medical care after his release from treatment for the June 10, 1997, accident. Barbara Lynch, employee benefits manager for respondent, testified claimant did not indicate that he was having any difficulties at work in the interval between the June 10, 1997, and June 7, 1999, accidents.

The claimant did seek treatment from Dennis Lee Anthony, D.C. in May 1998 for low back pain. Claimant gave the doctor a history of an onset of pain after lifting desks and chairs at work. Claimant neither gave notice nor made claim against respondent for this incident and the doctor's note does not indicate whether the incident occurred at work for respondent or at claimant's business. Claimant was released from treatment on June 6, 1998, and Dr. Anthony opined claimant did not have any permanent impairment for the conditions the doctor had treated.

On June 7, 1999, claimant suffered an accident when he strained his back while operating a rug cleaning machine while working for respondent. Claimant again received treatment with Dr. Fevurly. Claimant complained of left upper back and left shoulder pain.

Dr. Fevurly ordered a chest x-ray, cervical spine x-ray and a left shoulder x-ray which revealed some degenerative changes in his cervical spine at C4-5 and C5-6. The shoulder film was normal and the chest x-ray did not show a tumor. Dr. Fevurly ordered an electrodiagnostic test, an EMG, of the left upper extremity. This test revealed a median neuropathy at the left wrist and did not show findings to suggest a cervical nerve root impingement or brachial plexus injury.

Dr. Fevurly also saw the claimant on July 2, 1999, July 12, 1999, and July 26, 1999. When Dr. Fevurly saw the claimant again on August 9, 1999, he opined the claimant had reached maximum medical improvement. Because the claimant consistently demonstrated full range of motion in his shoulder and cervical spine the doctor further opined claimant did not have any upper back or left shoulder impairment. Dr. Fevurly noted that at this office visit the claimant complained of low back pain for the first time which the doctor did not relate to the June 7, 1999, accident.

Following claimant's release from treatment after the second injury, he continued working until an unrelated personal condition required him to leave his employment with respondent.

E. Bruce Toby, M.D., saw the claimant on November 29, 1999. Dr. Fevurly had referred the claimant to Dr. Toby for an assessment of his carpal tunnel syndrome. The history claimant reported to Dr. Toby included that he was injured in 1997 when a heavy pipe cutter weighing 800 pounds fell upon his left chest. Upon a physical examination of the claimant, Dr. Toby concluded the claimant probably had bilateral carpal tunnel syndrome. Dr. Toby recommended that claimant might benefit from a surgical release. Dr. Toby noted claimant neither gave a history of doing repetitive duties which caused him any injury nor of any aggravating injury in June 1999. Dr. Toby opined the claimant's carpal tunnel syndrome was not caused by something falling on his chest.

On March 9, 2000, Don B.W. Miskew, M.D. performed an examination of claimant. Dr. Miskew opined the claimant did not have any left shoulder impairment because claimant advised him that he was not having any shoulder problems. After reviewing the medical records regarding the June 7, 1999, incident, Dr. Miskew testified the claimant did not have any increasing low back symptomatology until several weeks later at which time the claimant was not working. Therefore, he did not relate any of the low back symptoms at the time of his examination to be caused or exacerbated by the June 7, 1999, incident.

Dr. Miskew further opined claimant's carpal tunnel syndrome was not related to his work environment because there was nothing in the medical records to indicate claimant's carpal tunnel syndrome complaints were caused by his work.

The Administrative Law Judge requested Vito J. Carabetta, M.D., to perform an independent medical examination of the claimant. Dr. Carabetta performed the examination on August 23, 2000. The claimant advised Dr. Carabetta that he had two

accidents occurring in June 1997 and June 1999 but claimant did not provide any history of repetitive trauma incidents. Dr. Carabetta opined that claimant's low back condition appeared to be associated with some underlying degenerative changes. Dr. Carabetta felt the claimant's work activities probably brought the underlying complaints to the surface so that they became apparent to the claimant. But Dr. Carabetta noted it is difficult to relate claimant's lower back complaints to the injuries that occurred on June 10, 1997, and June 1, 1999. Dr. Carabetta did not find any impairment to claimant's cervical spine or upper back nor did he relate any right arm or left carpal tunnel symptoms to any work-related incident.

Claimant saw Edward J. Prostic, M.D. on May 8, 2000, at the request of his attorney. Dr. Prostic performed a physical examination took x-rays and evaluated the claimant regarding his work injuries. Dr. Prostic testified the claimant did not advise him of any series of accidents. Claimant reported two specific injuries, one in June 1997 and an incident in June 1999.

Dr. Prostic opined the claimant sustained a series of injuries during the course of employment in 1997 and 1999. He diagnosed the claimant with injuries to his left shoulder and back; an aggravation of claimant's degenerative disc disease in his neck and back; and carpal tunnel syndrome. Dr. Prostic rated claimant's permanent partial impairment as 5 percent of the body as a whole for the cervical spine, 10 percent of the body as a whole for the lumbar spine, and 10 percent of each upper extremity at the shoulder for carpal tunnel syndrome, for an overall rating of 24 percent of the body as a whole.

On cross-examination Dr. Prostic testified claimant's carpal tunnel syndrome arose from the normal duties of claimant's employment as a janitor but he could not separate whether or not the carpal tunnel was caused by claimant's work for respondent or his work for his own janitorial company.

In workers compensation proceedings claimant bears the burden of proof. See K.S.A. 44-501(a). "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." K.S.A. 44-508(g). The Administrative Law Judge found claimant suffered two separate injuries at work but suffered no permanent impairment. The Board agrees that the greater weight of the credible evidence supports the Administrative Law Judge's conclusion in this regard.

Claimant was treated and/or examined by several physicians including Drs. Fevurly, Prostic, Carabetta and Miskew. Claimant gave all four a history of two separate accidents with no history of repetitive injuries or complaints. The claimant returned to work after receiving treatment and neither requested additional treatment nor made complaints to respondent in the interval between being released from treatment from the first injury up until the second injury, a period of 21 months. The Board agrees with the Administrative

Law Judge's finding that the claimant failed to meet his burden of proof to establish he suffered a series of repetitive traumas.

With the exception of Dr. Prostic, the doctors did not causally relate claimant's low back, bilateral carpal tunnel, upper back and cervical complaints to the work-related injuries. Dr. Fevurly treated claimant for both injuries and noted claimant did not make any low back complaints until August 9, 1999. Dr. Fevurly specifically concluded that as a result of the work-related injuries claimant did not sustain any impairment to his upper back or cervical spine. Furthermore, Dr. Fevurly could not attribute claimant's low back complaints to either accident. Dr. Miskew could not relate claimant's low back to the work-related accident of June 1999. Dr. Carabetta noted it was difficult to relate claimant's low back complaints to the two specific accidents in 1997 and 1999. The Board concludes the preponderance of the medical testimony supports the Administrative Law Judge's determination that claimant's low back complaints were not causally related to the two accidents.

Drs. Toby and Miskew also opined that claimant's carpal tunnel syndrome was not work-related. Furthermore, although Dr. Prostic related the carpal tunnel syndrome to his janitorial work activities, he admitted he could not determine whether claimant's work for respondent or claimant's work for his own janitorial service caused the condition. The Board adopts the Administrative Law Judge's finding claimant failed to prove the carpal tunnel syndrome was caused by the two work-related accidents.

Lastly, Dr. Fevurly, the treating physician, concluded claimant did not suffer any permanent impairment to his upper back or cervical spine as a result of the two work-related accidents. Dr. Fevurly noted claimant demonstrated full range of motion in his shoulder and cervical spine and noted on claimant's last visit his complaints were primarily of low back pain. The court ordered independent medical examiner, Dr. Carabetta, also determined claimant did not have any permanent impairment in his cervical spine or upper back. The Board finds this testimony more persuasive than Dr. Prostic's conclusion that claimant suffered permanent impairment to the cervical spine, especially when it is noted that upon his exam of claimant, Dr. Prostic found the neck to be normally aligned without tenderness or spasm.

The preponderance of the medical evidence establishes claimant did not suffer permanent impairment as a result of his two work-related accidents and that his low back and bilateral carpal tunnel complaints are not causally related to the two work-related accidents.

Although the Administrative Law Judge determined claimant had no permanent impairment, he nevertheless awarded future medical upon application to and approval by the Director. In the absence of proof of permanency from the work-related accidents, this portion of the Administrative Law Judge's Award should be modified to deny future medical benefits.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated April 5, 2001, should be, and is hereby, modified to deny future medical benefits but otherwise should be, and is hereby, affirmed in all other respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February 2002.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Chris Miller, Attorney for Claimant  
Kip Kubin, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director